## United States Court of Appeals for the Second Circuit



**APPENDIX** 

## 76-1095

In The

#### United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee.

FABIO CAPECE,

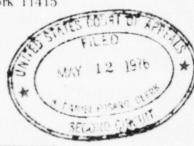
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#### APPELLANT'S APPENDIX

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D. C. Form No. 100 CRIMINAL DOCKET

### JUDGE PIERCE 73 CRIM. 8

		TITLE OF CA	SE			ATTORNEYS
	THE U	NITED STA	TES		For U. S.:	
		vs.			Eugene F.	Bannigan
	SALINA SCAR	NCELLA			264-634	6
	FABIO CAPECI	€				
					For Defenda	nt:
						-
	BETRACT OF COSTS	AMOUNT	ļ	CASH	RECEIVED AND DISBU	MSED
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Attorney,	engciology T.21					
	Secs. 846,812,					
	(1),841(b)(1)A)					
	cy to distribute					
	w/intent to dis-					
ribute	Schedule I. (Maril	uana)	One Coun	t)		
DATE				ROCEEDINGS		
19-73	Filed indictment					
	Salina Scarncell		Varrant o	rdered.	Duffy,J.	
	-					
	B/W issued.					
-19-73	Capece-(atty, pr	esent) Pl	eads not	guilty. Be	il fixed at	\$5,000.P.
	secured by 10%(\$					
	Case assigned to	Judge Pi	erce for	all purpos	ses. Gagl	ardi,J.
-03-70	FABIO CAPECE Tiled	matias -C	O SHARWING CO.	A C STA STETLE S	TO TATALANIA	manned 191

DATE	PROCEEDINGS	CLER	C'S FEES
		PLAINTIFF	DEFENDAN
1-2-714	FABIO CAPECE Filed Cov't Affidavit for Writ of Habeas Corpus, ret. 1-3-73.		
1-4-74	FABIO CAPECE Pre-Trial conference held as to Deft. Capece. Trial	-	
	May 13, 1974 @ 9:30 in Room 2804. Alan Salzman, new atty for Deft.		
	Deft's motions to be completed no later than February 18, 1974.		
	Gov'ts to be completed by February 28, 1974. Deft. was produced		
	in Court on a Writ - Writ safisfied PIERCE, J.		
1-8-74	Frank Capece. Filed true copy of writ of habens corpusWrit satisfied 1-4-74		
	Pierce, J.		
5-28-74	FABIO CAPECE Filed Deft's Notice of Motion for Relief of Attorney.		
5-6-74	FABIO CAPECE No appearance by Deft/ B/W ordered. Bail vacated.		
	Court sets bail at \$5,000, cash or surety in the event Deft. is		
	located and brought before me. Deft's atty, Alan Salzman is		
	relieved as atty for Deft Capeca PIERCE, J.		
6-6-74	FABIO CAPECE-B/w issuedPIERCE,J.		
6-24-74	FABIO CAPECE-Filed ORDER-Motion for relief of counsel grantedPI	ERCE,J.	
9-26-74	SALINA SCARNCELIA Y Closed ptotiction 22		
	Closed statistically because defendant ) is		
	() co-dorerdant) a		
	In (2) with an ) Orgiotas.		
-	io come paterne.		
-27-74)	Pre Trial Conference held as to deft. Capece not present (arry prese	nt) Trial	
	January 20, 1975 at 9:30 A.MRoom 501. Present bail continued. (Def		
	on bail). B/W vacatedPierce,J.		
10-31-74	FABIO CAPECE		
	Closed statistically because		
	() co-defendant ) a		
	( ) with ass ) furtified		
	In : 1) October Contract, this case		
	10 Still pending	EST COPY	AVAII ADI
	Cont'd, on Page #3	LOI OUF	WANTAR

DC	110 Par	C*12.53	Dooket	Continuation

DATE	PROCEEDINGS
1-3-75	FABIO CAPECE-Piled Govt's. affidavit for a writ of habeas corpus ad testificandum for William W. Meinecke directed to Warden, Federal Reformatory, Petersburg, Virginia Writ issued, ret. 1-13-75.
1-10-75	PABIO CAPECE-Filed Govt's. affidavit & notice of motion for an Order disqualifying Marvin Preminger, Esq. as counsel for deft.
1-17-75	FABIO CAPECE-Filed Govt's, memorandum of law in support of motion to disqualify counsel for deft. Capece,
1-20-75	PABIO CAPECE-Filed affirmation of engagement by Ira D. London, atty for deft.
1-21-75	FABIO CAPECE-Filed MEMO ENDORSED on govt's. motion filed 1-10-75. The motion to disqualify Marvin Preminger as counsel for the deft. is hereby granted. SO ORDEREDPierce, J. (mailed notice)
2-7-75	FABIO CAPECE-Filed deft's, motion to substitute counsel and to suppress evidence.
2-13-75	FABIO CAPECE-Filed Govt's. affidavit in opposition to deft's. motion to suppress evidence.
2-25-75	FABIO CAPECE-Filed writ of habeas corpus for William W. Meinecke, directed to Warden, Federal Reformatory, Petersburg, 'a. with marshal's return. Writ satisfied 2-3-75,,.Frankel,J.
3-6-75	FABIO CAPECE-Filed deft's. affidavit, re: substitution of attorneys.
4-16-75	Pre-trial conference held as to deft. Fabio Capece -Deft. present with attys.  Ira D. London & Marvin Premminger. Conference adjourned to April 8, 1975 at 4:300 for Attys. & deft. to decide who is to be his trial councelPierce J.  Pre-trial conference held as to deft. Capece - attys. present. Trial set for >-29-75 at 9:30 A.MPierce,J.
5-5-75	
	Filed transcript of record of proceedings dated 1-16-75
9-29-75	Hearing on motion to suppress begun & concluded. Motion denied.  Trial begun with a jury as to deft. Capace before Pierce, J.
9-30-75	
10-1-75	
10-2-75	
10-3-75	Trial continued. Court charges jury. Jury begins deliberations. Jury returns
	with a verdict of guilty as charged. Pre-sentence investigation ordered.  Sentence 11-21-75 at 9:30. Bail continuedPierce, J.
10-7-75	Filed Deft's. (Fabio Capece) & Govt's. requests to charge. SO ORDEREDPierce, J. (Court's Exhibit 2).
10-7-75	FABIO CAPECE-Filed deft's, requests to charge.
10-7-75	FABIO CAPECE-"1led Govt's, requests to charge.
10-7-75	FABIO CAPECE-Filed Govt's. supplemental request to charge.

DATE

PROCEEDINGS

Date Jude

10-7-75 FABIO CAPECE-Filed Govt's. voir dire requests.

10-7-75 FABIO CAPECE-Filed deft's. voir dire requests.

10-7-75 FABIO CAPECE-Filed Goyt's. memorandum of law.

V1-21-75 FABIO CAPECE-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS. Pursuant to the provisions of Title 21, Section 841, U.S. Code, the deft. is placed on Special Parole for a term of THREE (3) YEARS to commence upon expiration of sentence. Deft. is continued on present bail until 12-5-75 at 12 Noon at which time he is to surrender to the U.S. Marshal, room 506, to commence service of sentence. Pierce, J. Issued commitment 11-21-75.

12-08-75 FABIO APECE - Filed Notice of Appeal from Judgment of conviction on 11/21/75. (mailed notice)

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SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

22

SALINA SCARANCELLA and FABIO CAPECE, Defendants.

# NDICTMENT

Narcotics.Violation of T.21,\$\$
812,841(a)(1),841(b)(1)(A) and
846.

PAUL J. CURRAN

United States Attorney

Mark John ron

alen Salyman is relieved as es dex in located NO. 15 855 FABIO CAPECE - ( Jests Mat 9 c'yt Capera. Truit may 13, 1976 at 9.30 IN 6 31 - 710 appearance by Let Capea. B February 19, 1974. Goot to to to Bal vacated - court act boul at # 5 2804. Alan Satzman, new atten went bank cont to some held so to mil Containe had as to dayt Capace. Just's motions to be com on a hunt - west sother 1864 (Par Tunk Confirme hold as to Fed 28 Out was produced in Com with the 4 any Capiece. 20,1975- Tre

NDICTMENT (Filed September 19, 1973)

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i,

Ray. 5-27-72 (Conspiracy to distribute and possess with

FFB:AB 72-3142

72-3142 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA.

73 CNH 870

-V-

SALINA SCARANCELLA and FABIO CAPECE,

INDICTMENT

73 Cr.\_\_\_

Defendant 8 .

#### FIRST COUNT

The Grand Jury charges:

and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere SALINA SCARANCELLA and FABIO CAPECE defendants and William W. Meinecke and Michael Browne, named as co-conspirators but not as defendants,

fully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

EFB:A8 72-3142

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

- 1. On September 10, 1972, William W. Meinecke entered the Pennsylvania Railroad Station in New York City.
- 2. On September 10, 1972, William W. Meinecke presented four baggage claim checks, numbers c537759, c537760, c537758 and A65393, to a baggage storage clerk at Pennsylvania Railroad Station, New York, New York.
- 3. On September 10, 1972, William W. Meinecke had a conversation with Michael Peterson at Pennsylvania Railroad Station, New York, New York.
- 4. On September 6, 1972, Michael Browne drove a 1972 Plymouth, California License Ol6FPF, to the vicinity of the Santa Fe Railroad Depot, in San Diego, California.
- 5. On September 6, 1972, Michael Browne purchased a railroad ticket to New York City and checked for shipment to New York City three suitcases and a footlocker the contents of which were approximately 110 kilogram bricks of marihuana.
- 6. On September 6, 1972, Michael Browne drove a 1972
  Plymouth, California License Ol6FPF, to the vicinity of 1250
  North Grand Avenue, Santa Ana, California.

(Title 21, United States Code, Section 846.)

Tuest Foreman

Paul J. Collan

PAUL J. CURRAN United States Attorney

#### EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE PIERCE, J.

dhlm

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THE COURT: Present for the Covernment is Mr.

3 Davis; is that correct?

MR. DAVIS: Frederick Davis.

THE COURT: Present for the defendant is Mr.

Ira London; is that correct?

MR. LONDON: Yes. I use my middle initial D, but I will forgive your Honor for omitting it.

THE COURT: All right. Present is the defendant, Fabio Capece. All right.

There are some preliminary matters:

First of all, there is an outstanding motion to suppress. Defendant's motion to suppress is directed at the contents of three suitcases on two grounds: One, lack of probable cause; two, improper search, that is, illegal execution of warrant. The motion does not address itself to the contents of the foot locker.

By order of this Court, in the case of US v.

Meinecke, 73 Cr. 164, Southern District of New York,

August 15, 1973, the contents of the same foot locker were

ordered suppressed.

In light of that suppression order, the Government here has no objection to the suppression of the contents of the foot locker and it is so ordered. See affidavit of Assistant U.S. Attorney Davis, filed February

13, 1975.

As far as the contents of the suitcases are concerned, this Court is "not required to hold an evidentiary hearing if defendants moving papers don't state sufficient facts which, if proven, would require the granting of the relief requested." US v. Culotta, 413 Fed. 2d, 1343 at 1345 Second Circuit, 1969.

Further, the burden of showing facts supporting the allegation that the search was illegal was upon the defendant. US v. Halsey, 257 Fed. Sup., 1002, see 1005 and 1006, Southern District of New York, 1966.

In view of the fact that the defense motion fails to state any facts regarding the search on the authority of Culotta, no hearing will be held.

On the basis of the order of this Court denying the motion to suppress the contents of the same three suitcases at issue in the Meinecke case, 73 Cr. 164, defendant's motion to suppress the contents of the three suitcases is denied. See US v. Pond, 382 Fed. Sup., 556 Southern District of New York, 1974, affirmed number 75-1100, Second Circuit, August 28, 1975.

I don't --

MR. LONDON: May I be heard on that, your Honor?

THE COURT: To take an exception.

MR. LONDON: Well, I think there's a factual gap in your Honor's decision.

THE COURT: Yes, sir?

MR. LONDON: I did not make the motion; prior counsel made it.

THE COURT: Is there an outstanding motion that you have made?

MR. LONDON: No. I am relying on prior counsel's motion to suppress; and it was just my understanding of the law of the case that your Honor, having granted a hearing on Neinecke, based on the same motion, I believe when the motion was made, it was made for Meinecke and Capece. Meinecke was given a hearing. Evidentiary findings were made.

THE COURT: What's the bottom line, counsellor, of what you are saying?

MR. LONDON: The bottom line is: it's my position that the law of the case is that your Honor has ruled that an evident hearing should be conducted on the motion to suppress as against Meinecke.

Well, if that is the case, it would also apply to Capece.

THE COURT: All right. The same ruling. My

			_
1	jwlm	Dilts-direct 3	13
2	Λ	Yes.	
3	Q	Did you see the three of them together in New	
4	York City	, prior to that time?	
5	A	Yes.	
6		MR. LONDON: I object to the form of the quest	tion.
7		THE COURT: Yes.	
8		You said you saw Mr. Meinecke together with wh	no?
9		THE WITNESS: Mr. Capece and Miss Scarangela.	
10		THE COURT: Fabio Capece?	
11		THE WITNESS: Yes.	
12		THE COURT: Where was that?	
13		THE WITNESS: Well, we were all friends in Ne	w Yor
14		THE COURT: When was that?	
15		THE WITNESS: Prior to my leaving California.	
16		THE COURT: All right. Go ahead.	
17	Q	You mentioned before, that you were an addict	
18	is that r	right?	
19	A	Yes.	
20	()	What kind of drugs?	
21	۸	Heroin.	
22	0	It was on August 29th that you went into Syna	anon?

O Would you say, prior to your going in, your

recollection of events was somewhat hazy?

Yes.

Α

23

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MR. LONDON: Objection, it is leading.

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THE COURT: It is.

4

Reframe the question.

5

Q How would you characterize your recollection of the events, prior to your going into Synanon.

7

A I remember the events, but I was under the

8

influence of drugs.

9

MR. DAVIS: I have no further questions, but

10

may I approach the bench?

11

THE COURT: Yes.

12

(At the side bar.)

13

MR. DAVIS: Your Honor, there is one matter I

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think is minor. I do not have Miss Dilts' arrest or

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conviction record because I only discovered it recently.

16

17

She tells me for what it is worth, that she's had a number of convictions that were wiped off the record

18

because they are youthful offender convictions. I am

19

perfectly willing to let Mr. London attack her credibility.

20

I can't vouch for her background. I will try to get her

21

past records by tomorrow or the next day, and she can

22

be recalled as a witness if she lies about her arrests

23

THE COURT: Let him know on the record as soon

25

24

as you get it.

or convictions.

THE COURT: Make your record when the jury takes

24

25

on this.

1	jwlm	Browne-direct	50
2	Λ	Right.	
3	Q	The Fourth of July in '72?	
4	Λ	Yes.	
5	0	What was the occasion of your meeting her?	
6	Λ	Mutual friend brought her out to our house;	
7	their pur	pose: in dropping off a dog.	
8	Q	Who is this person?	
9	Λ	Roberta Dilts.	
10	()	Had you known her previously?	
11	Λ	Yes.	
12	0	How had you met her?	
13	Λ	I met her through her boy friend. She was w	ith
14	her boy f	riend.	
15	Q	How did you meet him?	
16	Α	As I was hitchhiking from Laguana Beach to	
17	Newport B	each, he picked me up.	
18	()	Did you talk to them?	
19	Λ	Yes.	
20	Ü	What did you so to them and what did they so	ay
21	to you?		
22	Λ	They told me they had a friend coming out to	
23	Californi	a in the near future to buy some marijuana, a	nd
24	they aske	d me if I would be interested in working for	
25	them.		

Thirty-five miles west; it's on the coast.

Elsinore is in the mountains, over the mountains.

24

25

Λ

1	jw1m	Browne-direct 52
2	()	Where are those two towns in relation to San
3	Diego and	Los Angeles?
4	Λ	Midway between San Diego and Los Angeles.
5	Q	Did you have any means getting in contact with
6	Miss Dilts	s and Miss Scarangela?
7	A	At that time?
8		MR. LONDON: I object to the form of the ques-
9	tion.	
0		THE COURT: How else can he ask it?
1		Overruled.
2	()	Did you have any means in getting in contact
3	with them?	?
4	Λ	At that time, they left their phone number.
5	Ü	And did you call them?
16	A	Yes.
17	Ω	What happened when you called them?
18	۸	They'd send a card periodically and they would
19	let me kno	ow when their friend was coming in and we should
20	all get to	ogether and meet.
21	Q	Did there ever come a time when they told you
22	the friend	d would come?
23	V	Yes.
24		MR. LONDON: I object to the form of the ques-

tion. Je are beginning to lead the witness.

1	jwlm	Browne-direct 53
2		THE COURT: You are.
3		Sustained.
4	Q	Did you receive any further phone calls from
5	them?	
6	Λ	They never called me. I phoned them.
7	Q	What happened when you called?
8	Λ	They told me that their friend had arrived and
9	I should	come down there.
10	Q	What
11		THE COURT: I have trouble with this "They said."
12	It's not	
13	Q	Who was it who talked to you?
14	Λ	Bobby.
15	Q	Miss Dilts?
16	A	Yes.
17		MR. LONDON: I object to conversations with
18	Miss Dill	ts. I do not believe
19		THE COURT: Is there a bill of particulars in
20	this case	9?
21		MR. DAVIS: No request, your Honor, no.
22		THE COURT: I will allow it.
23		Just a moment. I will allow it subject to
24	connection	on.
25	1	Looking at the indictment, is the Government

		19a
1	jwlm Browne-lirect	54
2	asserting that Miss Dilts is "others to the grand	jury
3	unknown"?	
4	MR. DAVIS: Yes, your Honor.	
5	THE COURT: All right. I will allow it	subject
6	to connection.	
7	O Mr. Browne, what did you do after receiv	ing
8	this phone call?	
9	A My wife and I then proceeded to go to th	eir
10	house in Dana Point.	
11	Q Whose house are you talking about?	
12	A Roberta Dilts and Salina Scarangela.	
13	O What happened after you arrived at their	house?
14	A Salina was not there any longer; Bobby w	as, and
15	she introduced me to Fabio and Bill Meinecke	
16	MR. LONDON: Sorry, I can't hear the lat	ter.
17	THE COURT: Read that last back.	
18	A She introduced me to Fabio, Fabio's wife	and
19	Billy Meinecke.	
20	Ω When you say "Fabio," do you mean Fabio	Capece?
21	A Yes.	
22	Q Do you see him in the courtroom?	
23	A Yes.	
24	Q Would you point him out to the Court and	describe

him for the record?

1	jwlm	Browne-direct	55
2	Α	White shirt and brown tie.	
3		MR. DAVIS: Let the record reflect the identity	fi-
4	cation of	Mr. Capece, your Honor.	
5		THE COURT: All right.	
6	Ó	You stated that Mr. Meinecke was with him.	
7	Λ	Yes.	
8	()	Could you describe Mr. Meinecke?	
9	Λ	Very large, over six feet tall, over 250 pour	nds.
10	Q	Did he have any particular marks on him?	
11	Α	Quite a few tattoos.	
12	Q	What happened after you arrived?	
13	Λ	Oh, we discussed a little business, mainly	
14	just soci	alized, met everybody; and later on, my wife	
15	and I lef	t and went home.	
16	Q	Did you talk to Mr. Capece at all that evening	ng?
17	A	Very briefly.	
18	Q	What did you say to him and what did he say	to
19	you?		
20	Α	We talked about what we were out there for a	nd
21	what my p	eart might be.	
22	Q	What did he say he was out for?	
23	Α	To buy some marijuana.	
24	0	What was your part to be?	

To transport the marijuana from whatever point

Λ

1	jwlm Browne-direct 56
2	he chose to what point he chose.
3	O Did he tell you he would pay you money for
4	this?
5	MR. LONDON: I object to the form of the ques-
6	tion, your Honor.
7	THE COURT: Leading, counsel. Sustained.
8	Reframe the question.
9	Q Were you to get paid for this?
10	MR. LONDON: I object to the form of the
11	question.
12	MR. DAVIS: I don't know how, further, to
13	reduce it, your Honor.
14	MR. LONDON: Your Honor, he already asked him
15	for the substance.
16	THE COURT: What would you get out of it, if
17	anything?
18	THE WITNESS: \$200.
19	Q And who was it who said that he or she would
20	pay you \$200?
21	A Fabio.
22	Ω And that was the first meeting?
23	A Yes.
24	Q Did you spend the night at that house on that

occasion?

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Either with Roberta or with Fabio.

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O And in general terms, what did they say when you spoke to them?

A "We are not ready yet."

Q What happened next?

A The rent on my house ran out the last part of August and I asked him if my wife and I could come and live with him until the time of this deal would take place.

O When you say "them," who are you talking about?
Who did you ask?

A I guess I asked Fabio, because at the end of the month, Bobby left and committed herself to Synanon; and by the time that my wife and I moved into the house, there was no one living there besides Fabio and Billy and his wife and two children.

- o Did there come a time when you did move in?
- A Yes.
- O Do you remember the date of that?

A Not the exact date, but I imagine it was the first days of September or the very last days of August.

Q Just to make sure we are together on this, who was actually staying at the house?

MR. LONDON: I object to that remark, your

1	jwlm	Browne-direct 59
2		MR. DAVIS: Come on.
3		THE COURT: Strike the remark.
4	Ó	Who was in the house when you arrived there?
5	Who was a	ctually staying at your house?
6	Λ	Fabio and his wife and two children and Bill
7	Meinecke.	
8	Ö	What was his wife's name?
9	Λ	Mary Capece.
10	Q	What happened after you moved in?
11	A	Mary got shortly thereafter, Mary and the
12	two child	ren went back to New York and there was no one
13	but Billy	and Fabio, myself and my wife.
14	Q	And what happened?
15	٨	They went out every day looking for marijuana.
16		MR. LONDON: I object to "what they were looking
17	for."	
18		THE COURT: Sustained. Strike it.
19	Q	Well, why don't you be more precise, Mr.
20	Browne.	Did you see anybody leave the house?
21	Λ	Yes.
22	n.t	Who left the house?
23	Α	We all left the house from time to time. Nobody
24	stayed th	nere all day long.

Did you ever talk with Mr. Meinecke or Mr. Capece

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THE COURT: Is this going to be an unpleasant afternoon, or are we going to be able to try this with a certain amount of basic civility. Rise and make your objection. Please do not get into arguments on the motion. You may state, briefly, in a word or two, the basis of your objection if you wish to, but I don't want to O Did either Mr. Meinecke or Mr. Capece tell you what they did when they went out to the house?

A They just said yes or no to whether they had gotten marijuana that day or not. I would ask them:

Are you ready? If you need me, yes or no.

() What period are we talking about then? What day was it you moved into the house?

A I would say the very last days of August, up to the very first day of September; one of those dates.

O Turning your attention to September 5th or so, of 1972, what happened on that day?

THE COURT: What date?

MR. DAVIS: September 5, your Honor.

A Billy and Fabio were down in San Diego, or had left very early in the morning to go to San Diego, and stayed overnight; and in the nighttime, I received a phone call.

- () From whom?
- A. Fabio.

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Q What did he say to you?

A He said they were ready; they had found the marijuana.

1	jwlm	Browne-direct	62
2	Ω	Did he say anything further?	
3	V	He said he would call me in the morning and	
4	give me th	ne details on where to meet.	
5	Ö	Where did you spend the night?	
6	Λ	There at the house in Dana Point.	
7	Q	Do you remember the address, by the way, of	
8	the house?		
9	Λ	No, not the number. I remember it was on a	
10	street na	med Lacosta.	
11	Ω	What happened the next day, September 6th?	
12	Λ	The next day, that morning, he called us and	I
13	told him	to meet us at Denny's Restaurant in Ocean Beac	:h.
14	()	Who called you?	
15	Λ	Fabio.	
16	0	Did you recognize his voice on the phone?	
17	, Λ	Yea.	
18	Ö	Do you remember what time of the day it was	
19	you recei	ved that phone call?	
20	Λ	Early in the morning.	
21	0	Tell us again what you remember and who said	
22	what.		
23	Λ	To come down to Denny's Restaurant in Ocean	
24	Beach, an	d that we would meet there.	
25	Q	Is Denny's Pestaurant a restaurant you knew?	

1	jwlm		Browne-direct 6	63
2		A	Yes.	
3		Q	What did you do after receiving the phone call	1?
4		Α	My wife and I jumped into my car and went down	n
5	there	٠.		
6		Q ,	This was your own car?	
7		Λ	Yes.	
8		0	What kind of car was it? Do you remember?	
9		Λ	'56 Volkswagen.	
10		Q	What happened when you got there?	
11		Λ	We met them there at that point. Fabio told	
12	me th	ey no	meded one more suitcase, gave me some money and	.f.
13	sent	ne or	ut to buy it.	
14		Q	How much money did he give you? Do you remember	er?
15		Λ	Approximately a hundred dollars.	
16		Q	Had you seen Mr. Capece with money, before that	t
17	time?			
18		Λ	Yes.	
19		Q	Do you know how much?	
20		Λ	Not exactly.	
21		Ų.	Did he ever tell you how much money he had?	
22		٨	I believe I asked him once, but I really could	in't
23	swear	to t	the fact. I believe it was somewhere in the	
24	neigh	borh	ood of 17,000.	

He said he had roughly that amount of money with

1	jwlm	Browne-direct 64
2	him?	
	Λ	Roughly.
3		Did you ever see a large amount of money on him?
4	Q	
5	Λ	Just once.
6	Q	Did you ever see a large amount of money on
7	Mr. Meine	cke?
8	Λ	No.
9	Q	Or did he ever talk about any large amounts of
10	money?	
11	Λ	No.
12	0	On the 6th, what happened after he gave you the
13	money?	
14	Λ	I bought the suitcase and returned to Denny's.
15	Q	Do you remember where you bought the suitcase?
16	Λ	A big department store in San Diego. I don't
17	remember	the name.
18	Ö	Can you describe the suitcase?
19	Λ	Ventura, top of the line, big; I believe it was
20	green or	yellow.
21	O.	What happened after you came back with the
22	suitcase	?
23	A	Fabio and Billy took the suitcase in a rented
24	car and	went where the marijuana was.

THE COURT: Repeat the last answer.

needed gas.

Which car was this?

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1	jwlm	Browne-direct	66
2	Α	The rented car needed gas.	
3	Q	The rented car?	
4	A	The rented car.	
5	Ö	Do you remember what kind of car it was?	
6	Λ	It was a Chrysler product. It was either a	
7	Plymout!	or a Dodge Scamp or a Dart, one of the com	pacts;
8	they look	a lot alike.	
9	Q	Who had rented it, if you know?	
10	A	Mary	
11		MR. LONDON: Ask the witness if he knows of	
12	his own k	nowledye.	
13		THE COURT: Yes.	
14	Q	Do you know who rented it, of your own knowl	edge?
15	Λ	Not exactly.	
16	Q	Do you know who had driven the car?	
17	۸	Yes.	
18	Q	Who?	
19	۸	Mary and Billy Mcinecke.	
20	O.	Had you ever seen Capece drive the car?	
21	Λ	No.	
22	Q	What happened after you went out to the car?	
23	A	Billy gave me the keys. He was driving.	
24		THE COURT: Meinecke?	
25		THE WITHESS: Right. He told me to go to the	e

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gas station, gave me some money. I jumped in that car, 2 the rented car, and my wife followed me to the gas 3 station, got gas; and I then drove to the San Diego train

station and they followed me there.

Q This is the train station in downtown San Diego?

Λ Yes.

Do you remember what time of the day it was when you arrived at the train station?

A In between late morning and forenoon; right around noontime.

() What happened after you arrived at the train station?

A 1 got out of the car, unlocked the luggage from the trunk, loaded it onto a luggage area and took it inside.

- Q llow many bags were there at that point?
- Three suitcases.
- O Then what happened?

A They had followed me there. I went in. I bought the ticket. I helped weigh the luggage.

THE COURT: Excuse me.

All right. Proceed.

O Let me take this, one step at a time, Mr. Browne.

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1	jwlm Browne-direct 68
2	You carried the three diteases by yourself
3	into the train station?
4	A I pushed them in on a luggage carrier.
5	Q How heavy were they?
6	A Extremely heavy.
7	Q What did you do when you got inside the station
8	One step at a time.
9	A Took them over to the ticket counter. The lady
0	asked me where I was going. I said, I wanted a ticket to
1	New York City. She asked me if this was all my luggage
2	and I said yes. And she tried to pick one up and put it
3	on the scale and weigh it, and couldn't; and so I helped
4	her.
5	Q And then what happened?
6	A Then she wrote me up my ticket, took my phone,
7	and gave me three baggage receipts and the ticket, told
8	me the train left at 4:30.
9	Q Did you use a name for the purpose of getting
0	that ticket?
1	Λ Yes.
2	Q What name did you use?
3	A Pater Beck.
4	Q Whose name is that?

No one's that I know of.

Yes.

1	jwlm	Browne-direct	70
2	Q	Do you remember how much, roughly, the bill	was?
3	A	Roughly 155 to \$180.	
4	Q	Where did you get the money from?	
5	Λ	From Fabio.	
6	Ω	When had he given it to you?	
7	Α	Prior to my leaving there, probably at Denny	y's
8	Restauran	t.	
9	Q	What happened after attending to your busine	ess
10	at the tr	ain station?	
11	A	I then left. I got into the rented car and	
12	drove aro	und the block. They followed me in my Volks	wagen.
13		THE COURT: Why do you say they followed you	ıı
14	in your V	olkswagen?	
15		THE WITNESS: That was the plan.	
16		THE COURT: Simply because it was the plan	you
17	tell us?		
18		THE WITNESS: No, because I could see it in	
19	my rear v	iew mirror. They were directly behind me.	
20	Ω	What happened?	
21	Α	I stopped the car in a parking space. They	
22	stopped m	y car behind me. I got out of the rented car	r
23	and gave	Fabio the tickets and the baggage receipts and	nd
24	the keys	to his car back. He gave me my keys, and we	

talked briefly, and I was to follow them to Los Angeles

1	jwlm Browne-direct 71
2	to take the rented car back and to drop them off at the
3	Los Angeles Airport.
4	Q Tell us what you actually did. What happened
5	after meeting?
6	A I gave him the tickets.
7	THE COURT: "Him" being?
8	THE WITNESS: I gave them to Fabio. I am not
9	sure what he did with them. I handed them to him. He
0	gave me my money.
1 .	Q How much money did he give you?
2	Λ \$200. It might have been 250. I just can't
3	remember the exact amount.
4	() Where did you go after this?
5	Λ We then proceeded to where the rented car
6	belonged and dropped it off.
17	O Do you know what town that was in?
18	Λ Santa Ana.
19	Q Do you remember the street?
20	A Grand Avenue Gas Station.
21	() How did you drive there?
22	A I drove in the Volkswagen with my wife and he
23	drove in the rented car.
24	() What happened then?

Fabio drove in, transacted business, and we

1	jwlin	Browne-direct	72
2	atayaa ou	tside.	
3	Q	Do you remember what happened while you were	
4	standing	outside?	
5	Α	He was lifting up the front of my Volkswagen	
6	Q	Meinecke was?	
7	Λ	Yes.	
8	Ó	Where was your wife?	
9	Λ	Standing there with us, or she went to the	
0	bathro m.		
1	Q	Then what happened after the rental place?	
2	Λ	We started off on our way to L.A. Airport.	
3	Q	And what happened?	
4	Λ	We got a flat tire on the way, but that wasn	't
5	really of	much consequence. We arrived at the airport	
6	early. W	e went in to get the ticket. We were going to	0
7	have a dr	ink, but they refused me service at the bar,	so
8	that is w	hen we parted company.	
9	Ω	How old were you then?	
0		That was before I was 21. I guess I was 20.	
1		THE COURT: We'll take a recess at 3:30 if the	hat
2	is satisf	actory.	
3	Q	Mr. Browne, I brought out here three suitcase	es
4	that I ha	ve labeled Covernment's Exhibit 1A 1B and 1C	

Will you come down here or somehow take a good look as

was it?

I don't

106

jwlm	Browne-cross
٨	Yes, sir.
Q	It was i — a search for the truth,
Λ	Yes, well
	MR. DAVIS: Objection to form.
	THE COURT: Sustained as to form.
Λ	Well
0	Was it a search for the truth?
	THE COURT: Sustained as to form.
understan	d that question.

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up.

MR. LONDON: Your Honor, may I put on the side bar, simply, the foundation for that?

THE COURT: Yes. Hand it up.

Can you reframe the question?

Indicate for the record what page you handed

MR. MONDON: 126, your Honor.

THE COURT: Of the grand jury minutes?

MR. LONDON: No, prior proceedings dated -- several dates -- August 15, 16, 17.

THE COURT: 1900 what?

MR. LONDON: '73.

THE COURT: Go ahead.

Q Mr. Browne, do you recall testifying at the prior proceedings in August of 1973, shortly after you

			39a
1	jw1m	browne-cross	107
2	testified	in the grand jury?	
3	Λ	Yes.	
4	Ú	Do you recall being given an oath on that	
5	occasion?		
6	Λ	Yes.	
7	Q ·	Was that an oath to tell the truth?	
8	Λ	Yes.	
9	Q	Did you consider that oath partial, as far	as
10	its influ	ence on you was concerned?	
11	А	No.	
12	Q	Was it your intention to tell the truth or	that
13	occasion?		
14	Λ	Yes.	
15	Q	Did you tell the truth?	
16	Λ	In all but one or two aspects. I believe	I
17	brought t	hat out earlier.	
18	Q	What are the two aspects that you did not	tell
19	the truth	1?	
20	۸	I did not	
21		THE COURT: So far, I will allow the inqu	iry

w the inquiry that you are pursuing, but you have got a very thick document here. If you put to him certain readings from the document and ask him whether he was asked those questions and gave those answers, I think we will be able to

Do you recall it being asked of you and your

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giving that answer?

- Yes.
  - Do you recall this question and answer:
  - And will you tell us when that was, to the best of your knowledge?

"A When I was hitchhiking from Newport Beach to Laguana Beach one day, she and another woman picked me up.

- Do you know what month it was? "()
- About the middle of August." 'A Do you recall those questions and answers?
- Yes, sir. Λ
- Was that latter part truthful?
- No, sir. Λ
  - That was part of your protective truth system, was it not, Mr. Browne?
    - Yes, sir. Λ

MR. DAVIS: I object to "system," your Honor.

THE COURT: Yes. Well, overruled.

Move on.

- Mr. Browne, is it not a fact that you lived at Miss Scarangela's house in the early part of 1972?
  - The early part of 1972? Λ
  - That is exactly what I said, Mr. Browne.

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A Correct.

Q Was Miss Dilts a partner in the marijuana transaction you described?

MR. DAVIS: That calls for a conclusion; your Honor, I object.

THE COURT: Sustained.

o was Miss Dilts any part -- did she serve by role whatsoever in this transaction you described?

MR. DAVIS: Same objection, your Honor. Among other things, it is a compounded question.

THE COURT: Overruled.

- O Answer the question.
- A es.
- She was a partner?
  - A She was affiliated.
  - O Tell us what you mean by "affiliated," Mr. Browne.

A She couldn't have been a partner because she was not there and her money was not involved in the deal, but she was affiliated, as she knew Fabio and introduced us to him.

Q In other words, it was your feeling that she had some interest in it by having introduced you to Fabio and started the ball rolling, so to speak?

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connecting proof to your Honor at the side bar?

THE COURT: At the end of the day, I will take it once the jury has left.

MR. LONDON: It loses --

going to do it now.

MR. LONDON: I respectfully except, your Honor.

Q Do you recall taking the things from Roberta's apartment without her permission and selling them and converting the money to your own use?

MR. DAVIS: I object to the relevance, your lionor.

Do you recall doing that?

THE COURT: The objection is sustained.

Don't answer the question.

O Mr. Brown, I ask you if it was affection for Roberta Dilts --

- A You got the wrong idea.
- Q -- to sell her belongings.

There is no testimony: he sold the belongings. I have not allowed the inquiry, so there can be no answer; and we are not concerned with his affection for Roberta Dilts anyhow.

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Government produced. I submit that shows that he knew Mrs. Capece, who was the person who rented the car that was used for this deal, and it's under M, your Honor, not under C. I believe there is a strong inference that can be raised that they knew each other.

To speak very briefly further, I think the facts of the case are very similar to those in Ruise, R-u-i-s-e, which I mentioned. In that case, the particular issue was whether there was enough non-hearsay evidence submitted against the defendant to allow in hearsay evidence under the co-conspirator confession, and almost the only non-hearsay evidence was the fact that the conspirator, not the defendant, was found when arrested, with the defendant's telephone number on him; and the court found, without any express difficulty, that that was relevant and probative to show that the two knew each other and participated together.

THE COURT: Is it hearsay?

MR. DAVIS: I don't believe it's hearsay, your Honor, The court has held it was not hearsay in Ruise. Hearsay is denied in 801 -- pardon me -- 801(a), as being a statement, either oral or written assertion or non-verbal conduct of a persor -- by a person if -- and this is what I am emphasizing -- if it's intended by him

rationale that seemed to be applicable. It seemed to me, for starters, if it is approached as a hearsay problem, without determining whether that is the problem or not, it would appear evident that Mr. Meinecke did not sit down and make any entries in his telephone book from the time he was apprehended until the time he was searched. I think that is a reasonable conclusion.

Further, that he probably made no entries on any of the other documents from the time he was apprehended until the time he was searched. So that if we are dealing with hearsay statements, they are statements which existed reasonably -- I would take it, it's reasonable for us to assume, prior to his apprehension.

Now, if that -- if we are past that problem, then it seems to me we can deal with these statements visaa-vis Mr. Meinecke, who is an alleged co-conspirator, as we could deal with them as if he were a defendant in this case. And if he were a defendant in this case, these would be received barring some other kind of objection.

Where do we go from there?

MR. LONDON: I am sitting here waiting to present my view of this, Judge; and if I may at this point, it seems to me that if I try to submit, in evidence,

jwlm

on the record why I am resting at this point, if I could.

As I stated a number of times, including yesterday afternoon, it has and had been my intention to call Mr. Meinecke as a witners in this case. I am not going to do so. The reason for this is that ever since I first met Mr. Meinecke and stated my intent to call him as a witness last January, he has at all times refused to talk to me, and said, "I simply don't want to talk to you," which is his right.

I had as a lall along, as I believe I have a right to do, that if called and put under oath, he would testify truthfully.

This morning at about 11:00 o'clock, Mr. Meinecke came to my office with Mr. Steinboch from the Federal Defender Services unit, who is in court at this point, and for the first time sat down and told me what he would say if called as a witness; and I talked to him, I think, for perhaps between ten and fifteen minutes.

I believe, Mr. Meinecke would testify the way he talked to me. I do believe what he said is not the truth.

MR. LONDON: I object to that. I don't believe it belongs on this record.

THE COURT: I think it might, if Mr. Davis is headed toward where I suspect he is.

jwlm

MR. LONDON: He is headed there, Judge, inexorably.

MR. DAVIS: I simply made a decision in my office

that it would not be proper in this case to call someone

whom I felt would not tell the truth.

THE COURT: As a Government attorney, indeed, you have to make that judgment.

MR. DAVIS: Immediately, I told Mr. London the details of what Mr. Meinecke told me, since they were in part, at least, essentially exculpatory to Mr. Capece.

MR. LONDON: Your Honor, may I introduce counsel for Mr. Meinecke. He is in the courtroom.

MR. STEINBOCH: Daniel Steinboch, S-t-e-i-n-b-o-c-h.

THE COURT: Thank you for coming.

MR. STEINBOCH: I would say, I don't think it's necessary to interrupt the case. It's Mr. Davis' belief that Mr. Meinecke's statements are untruthful.

THE COURT: Anything else you want to say beyond that?

MR. STEINBOCH: No.

THE COURT: We are back to the Government attorney. Is it your intention, now, to rest, once that jury is called back out here?

MR. DAVIS: Mine, your Honor?

THE COURT: Yes.

I just remember this.

I want to go into one other area, Judge. I am leaving that area for your Honor to decide, and offer no further argument. If your Honor declines to permit me to bring that out, I know I have my exception, and I know I will have no further issue on that and abide by the Court's ruling.

There is, however, a much more important issue to my way of thinking. The testimony of Mr. Browne was, that he lied to the grand jury and to a prior petit jury. He explained this at the prosecution's request. If your Honor recalls, I objected and the prosecution was allowed to go into this.

He said, "I did it to save Roberta or to keep Roberta out of this," meaning Roberta Dilts, also a prosecution witness.

I wish to offer testimony from Miss Dilts, indicating that Mr. Browne did not omit knowing her for six months to save her, but did it to keep from the Government authority and from the jury the fact that he had engaged in marijuana and LSD transactions with Miss Dilts over that period of time.

It is my belief that we would fall within Rule
404: "Character evidence not admissible to prove conduct."

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in cross-examination.

THE COURT: Mr. London, I will not allow the inquiry that you seek, pursuant to 404(b) for several reasons:

I believe from our recheck of our notes, that the issue of the explanation did come out on cross-examination by you, but quite apart from that, I do not believe that the Court should in this case allow the inquiry which you seek for the purpose that you have in mind.

I believe that we would be going into areas that would take us far afield from what we are concerned with here, even if it is considered as even remotely bearing or for that matter, even closely bearing on what it is you seek to show. So I won't allow it, and you have your exception.

MR. LONDON: I wish to make an offer of proof, then, Judge, so you know exactly what I intend to prove.

THE COURT: You made your offer. I thought I had your offer up to now.

MR. LONDON: I don't know if I spelled it out exactly, and I would like to.

Your Honor noticed during the course of the trial --

THE COURT: Let's make clear what happened. You

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ı	jwlm	Dilts-direct	358
2	Q	And did you meet them as a family?	
3	A	Yes, sir.	
1	Q	And during the time you met them, did you	come
5	to learn	that Mary Capece had leased a motor vehicle	in
6	Californi	a?	
7	A	Yes, sir, they wanted to see Disneyland and	d
8	the Zoo	you know, things that tourists come out for	or.
9	Q	Was it your understanding that they were to	here
)	on a vaca	ation?	
1	A	Yes, sir, it was.	
2		MR. DAVIS: I object to the leading.	
3		THE COURT: You are leading and she is you	r
4	witness o	on direct testimony.	
5	Q	During this time that you spent	
6		MR. LONDON: I will withdraw that.	
7	Q	Going back to August of 1972 and the first	wee
8	in Septer	mber, 1972, could you tell us with what freq	uenc
9	you saw	the Capece family?	
0	A	Well, I left about August 29th; so you wou	ld
1	have to	say, you know, right before that time. Is t	hat

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what you mean?

Q

Yes.

A Yes, we all lived in the same house. I was sleeping on the couch and I let the two girls have my

1	jwlm Dilts-direct 359
2	room.
3	O In other words, you were in the same house; you
4	saw them daily?
5	A Yes.
6	Q During the course of the time that you spent
7	with that family, did you hear Fabio Capece, the defendant
8	herein, make any statement with reference to purchasing
9	marijuana in California?
10	A No, sir.
11	Q Was Mike Browne a visitor to that house?
12	A Yes, sir, he was.
13	Q Did you hear Mike Browne discuss in that time
14	period, a marijuana transaction?
15	A Well, he always bragged that he could get the
16	best marijuana and he could get marijuana.
17	MR. DAVIS: May I ask that the answer be
18	stricken, your Honor; unresponsive to the question, if
19	only because of the time period, your Honor.
20	THE COURT: Can you narrow the time? Overruled
21	Narrow the time.
22	Q This statement that you say Mike Browne had
23	said, did this occur in August of 1972?
24	A It had occurred prior to August and in August.
25	MR. DAVIS: I ask it be stricken, your Honor.

put his initials on them, and how he sent up a certain amount of the marijuana to the lab in California. We introduced all of the receipts with the numbers on it, so I can tell it's the same marijuana.

And you heard Peterson and Smith tell you how these same suitcases, which they initialed also, arrived in New York and they were given the same tickets by William Meinecke to pick them up.

this agreement, this understanding among some people, to send the marijuana to New York. And while you remember that there was much made about whether certain agents had various training to detect marijuana, as to whether or not this was marijuana, the simple answer is, that if you feel all these kids were going through this trouble to send spinach leaves or dandelions, then you acquit. But I submit to you that all the material in these suitcases was marijuana. Of course, you have not one, but two chemists concluding the same thing.

The second question is whether the Government has shown to you that Mr. Capece participated in this conspiracy and the Government submits to you that you have nothing short of overwhelming evidence to conclude that. You have facts introduced by people other than

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Michael Browne, that at least are an incredible coincidence.

You have the fact that Mr. Capece was out there staying with Miss Scarangela, and you know that, not only because Michael told you, but, of course, Bobby Dilts told you that as well; and Scarangela's name and LaCresta which is the street on the voucher. You have the fact that it was his wife who rented the car that was used to carry these things down. Remember, Mike Browne had a car of his own, but they just happened to use the car rented by Mary Capece. And you also heard that on a prior occasion, Mary Capece had rented a car with a man who said he was her husband, who said he didn't have a driver's license. So you can well find that when Mary Capece rented this car, she did it for Fabio Capece.

Then you have the curious coincidence that the person who happens to pick up the luggage with all the marijuana in New York, is a friend from New York of Fabio Capece's and you have more than just Mike Browne's testimony as to the fact that Meinecke and Capece, who were out in California together, were also friends back here in New York, because Bobby Dilts told you that same thing.

On the top of this, of course, you have the man who blew the whistle on this: Michael Browne. You have seen how his character has been attacked by the defense

## COURT OF APPEALS FOR THE SECOND CIRUCIT

UNITED STATES OF AMERICA. APPELLEE.

- against -

FABIO CAPECE. APPELLANT, Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

being duly sworn. I. Reuben A. Shearer depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street. New York New York 10030

That on the

12th

day of

One St. Andrews Plaza, New York, New York

deponent served the annexed Appendix Brief

upon

Robert B. Fiske Jr.

in this action by delivering a true copy thereof to said individual the personally. Deponent knew the person so served to be the person mentioned and described in said herein. papers as the

Sworn to before me, this

12th

day of

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Reuben Shearer

No. 31 0418950 Qualified in New York County Commission Expires March 30, 1977.